Supreme Court, U. S.
FILED
OCT 7 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-3821

FEDERAL ENERGY ADMINISTRATION ET AL.,
PETITIONERS,

v.

ALGONQUIN SNG, INC., ET AL.,

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

FRANCIS X. BELLOTTI,
Attorney General of Massachusetts,
THOMAS R. KILEY,
S. STEPHEN ROSENFELD,
Assistant Attorneys General,
Room 373, State House,
Boston, Massachusetts 02133.
JAMES S. HOSTETLER,
GADSBY & HANNAH,
1700 Pennsylvania Avenue, N.W.,
Washington, D.C. 20006.

BATEMAN & SLADE, INC. BOSTON, MA.

Table of Contents.

Jurisdiction 2

Argument 2

I. Certiorari should not be granted because the President and petitioners have announced their intention to abandon the license fee program declared unlawful by the Court of Appeals 2

II. Certiorari should not be granted because the decision of the Court of Appeals is consistent with other pertinent Federal decisions and the legislative history of Section 232(b) 7

III. Further consideration of petitioner's claim is inappropriate because respondents are entitled to relief for procedural violations not reached by the Court of Appeals 14

A. Respondents are entitled to relief because of procedural violations of Section 232(b) 14

B. Respondents are entitled to relief because of procedural violations of the National Environmental Policy Act 15

C. Respondents are entitled to relief because of procedural violations of the Federal Energy Administration Act 16

Conclusion 18

Table of Authorities Cited.

CASES.

Blanchette v. Connecticut General Insurance Corp., 419 U.S. 102 (1974) 7, 8
Brown v. Allen, 344 U.S. 443 (1953) 6n
Calvert Cliffs' Coordinating Committee v. AEC, 449 F. 2d 1109 (D.C. Cir. 1971) 16
City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941) 6n
Continental Casualty Co. v. United States, 314 U.S. 527 (1942) 10
District of Columbia v. Sweeney, 310 U.S. 631 (1940) 5n, 6n
Environmental Defense Fund v. Ruckelshaus, 439 F. 2d 584 (D.C. Cir. 1971) 17
Federal Maritime Commission v. Seatrain Line, Inc., 411 U.S. 726 (1973) 13
Federal Power Commission v. New England Power Company, 415 U.S. 345 (1974) 9
Haynes v. United States, 390 U.S. 85 (1968) 12
National Cable Television Association v. United States, 415 U.S. 336 (1974) 8, 9
In Re Penn Central Transp. Co., 384 F. Supp. 895 (Special Court 1974) 8
Pennsylvania Gas and Water Company v. Federal Power Commission, 427 F. 2d 568 (D.C. Cir. 1971) 17
Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 5, 6

United States v. Arredondo, 31 U.S. (6 Peters) 691 (1832) 10
United States v. Johnson, 323 U.S. 273 (1944) 7
United States v. Kras, 409 U.S. 434 (1973) 6n
United States v. Price, 361 U.S. 304 (1960) 12
Yoshida International, Inc. v. United States, 378 F. Supp. 1155 (Cust. Ct. 1974) 9, 10
Zuber v. Allen, 396 U.S. 168 (1969) 13

STATUTES.

28 U.S.C.
§ 1254(1) 2
§ 1291 2
§ 1331 2
§ 1340 2
Federal Energy Administration Act, 15 U.S.C. §§ 761 et seq. 14, 16, 17, 18
§ 766(c) 16n
§ 766(i)(2)(A) 2
Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483(a) 8
National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. 15, 16, 17
Social Security Act of 1970 11, 12
Trade Act of 1974, § 127(d), Pub. L. 93-618, 88 Stat. 1993 2

Trade Agreement Act of 1934	10
Trade Agreement Extension Act of 1955	13
Trade Expansion Act of 1962	10, 14, 17
Section 232(b), 19 U.S.C. § 1862(b)	2, 3, 4, 7, 9, 10, 11 et seq.
Section 351(a)(1), 19 U.S.C. § 198(a)(1)	11n
Trading With the Enemy Act, 50 U.S.C. App. § 5(b)	9

MISCELLANEOUS.

Council on Environmental Quality, Third Annual Report (1972)	16
H.R. 1767	4
H.R. Rep. No. 91-1435, 91st Cong., 2d Sess. 23 (1970)	11
The Oil Import Question (1970)	13
Presidential Proclamation 4341	3
Presidential Proclamation 4355, 40 Fed. Reg. 10437 (1975)	3, 4, 17n
Presidential Proclamation 4370, 40 Fed. Reg. 19421 (1975)	4, 17n
S. 1849	4
Supreme Court Rule 19, 28 U.S.C.A.	2, 3
40 Fed. Reg. 4771 (1975)	17
40 Fed. Reg. 36302 (1975)	5, 17n
40 Fed. Reg. 42578 (1975)	5, 17n
40 Fed. Reg. 43950 (1975)	5
116 Cong. Rec. 43625 (1970)	12
116 Cong. Rec. 43645 (1970)	12

In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No.

FEDERAL ENERGY ADMINISTRATION ET AL.,
PETITIONERS,

v.

ALGONQUIN SNG, INC., ET AL.,

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

This brief is submitted by the Attorney General of Massachusetts on behalf of nine states and the governors of eight of those states, all of whom are respondents in the above-captioned matter. A separate, but similar, brief will be submitted on behalf of ten utilities and Congressman Drinan,

who are also respondents. Except as otherwise noted, the preliminary material contained in the petition for a writ of certiorari is adopted. Throughout this brief, Section 232(b) of the Trade Expansion Act of 1962, 19 U.S.C. § 1862(b), as amended by Section 127(d) of the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1993, is referred to simply as Section 232(b).

Jurisdiction.

Jurisdiction of the lower federal courts was properly invoked. The jurisdiction of the District Court was based on 28 U.S.C. §§ 1331 and 1340. Respondents filed in the Court of Appeals an appeal from a final decision of the District Court pursuant to 28 U.S.C. § 1291 and a petition for review of Federal Energy Administration regulations pursuant to 15 U.S.C. § 766(i)(2)(A). Jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

Argument.

I. Certiorari should Not be Granted Because the President and Petitioners have Announced their Intention to Abandon the License Fee Program Declared Unlawful by the Court of Appeals.

There are no "special and important reasons" for granting a writ of certiorari in this case as required by Supreme Court Rule 19, 28 U.S.C.A. This is not to say that the energy crisis does not pose real problems or that the legal questions presented are not scholarly. It is only to say that the traditional criteria embodied in Rule 19 are lacking. In illustrating the character of reasons which may be deemed "special and important," that Rule refers to cases:

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Petitioners point to no conflict among the courts of appeals nor between the lower court decision and earlier decisions of this Court. Instead they state the proposition that the scope of the President's authority under Section 232(b) to impose license fees on imported petroleum products is a matter "of fundamental and urgent importance to the economic well-being of the Nation and should be resolved by this Court." (Pet. at 11.) Respondents agree that the federal question presented by the petition is one of substance, but submit that it is inappropriate for resolution by this Court and that it is not of fundamental and urgent importance. In fact, the public pronouncements made by the President and petitioners since the issuance of Presidential Proclamation 4341 suggest that the license fee program, declared unlawful by the Court of Appeals, is not even basic to the President's energy program.

On March 4, 1975, the President issued Proclamation 4355 which delayed the imposition of the supplemental license fees for sixty days. That Proclamation opens with the following rationale:

> "WHEREAS, I judge it necessary and consistent with the national security, taking into account the economic welfare of the Nation, that provision be made to defer scheduled increases in the fees applicable to imported petroleum and petroleum products for two months. . . ." 40 Fed. Reg. 10437 (1975).

On the same day the President vetoed H.R. 1767, a measure which would have suspended for a period of ninety days any authority the President might have under Section 232(b) to adjust imports with a fee mechanism. There are obvious inferences from the executive actions taken on March 4th. The first is that the interests of national security really are not the issue in this case, since those interests did not change between January, when the license fees were seen as imperative, and March, when their deferral was necessary. The second inference is that the President was willing to bargain with Congress on energy policy.

Both of these inferences are supported by the language of Presidential Proclamation 4370, issued on April 30th, which also deferred the imposition of the two and three dollar license fees in the name of "national security." In that Proclamation the President spoke of a need to "maintain flexibility to accommodate evolving programs for discouraging [oil] importation" and the Congressional need to develop "alternative programs." 40 Fed. Reg. 19421 (1975).

Even after the license fees were declared unlawful by the Court of Appeals, the petitioners and President have retained a bargaining posture concerning license fees. On August 15, 1975, the President announced that he would indefinitely suspend supplemental fees on imported petroleum if Congress sustained his veto of S. 1849, a six month extension of controls on oil. On the same day the petitioner Federal Energy Administration announced a program of deferred payments and contemplated suspension and forgiveness of uncollected fees. 40 Fed. Reg. 36303 (1975). The United States Senate did sustain President Ford's veto on September 9, 1975. The FEA has reiterated this basic bargaining position as recently as September 11, 1975, when it announced that a decision finally to suspend the license fees would not be made until Congress had acted on a short-term extension of price controls. 40 Fed. Reg. 42578 (1975).

On September 22, 1975, the Federal Energy Administration announced the removal of the sixty cents per barrel fee on imported refined petroleum products, which had been imposed on June 1, 1975. The sixty cents fee was removed retroactively to September 1, 1975. The FEA simultaneously stated that President Ford will decide by October 1, 1975, whether to remove the remaining two dollars per barrel fee on imported crude oil. 40 Fed. Reg. 43950 (1975).

The proposed program of suspension and forgiveness has a dual significance to this Court. First, it emphasizes the fact that the essence of the President's energy program is higher prices which will in turn lead to conservation. Both decontrol and license fees are merely means to achieve the end, higher prices. The executive and legislative branches of the government are still actively seeking a mutually acceptable energy policy and discretionary intervention in the bargaining process by this Court would be untimely and inappropriate.

Second, and perhaps more important, the fact that collection of the license fees has been suspended renders this case

"academic and episodic"[1] within the meaning of *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). The language of Justice Frankfurter's opinion bears repeating:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." *Id.* at 74 (citations omitted).

In the case at bar, petitioners seek to invoke the discretionary certiorari jurisdiction of this Court because of the importance of a license fee system they intend to abandon.

[1] In *District of Columbia* v. *Sweeney*, 310 U.S. 631 (1940), certiorari was denied "in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance." Ordinarily a denial of certiorari is without "stare decisis" effect as to the issue presented in the petition therefor. *City of Indianapolis* v. *Chase Nat'l Bank*, 314 U.S. 63 (1941). This follows from the ordinary practice of the Supreme Court not to explain such a denial. "Of course, when the reasons are given, the decision to deny [a petition for a writ of certiorari] will have the effect indicated by the reasons stated." *Brown* v. *Allen*, 344 U.S. 443, 489 (1953) (Frankfurter, J., speaking for the majority as to this issue). See, *United States* v. *Kras*, 409 U.S. 434, 443 (1973). Respondents submit that the logic implicit in the *Sweeney* denial of certiorari is compelling in the instant case.

Even if all the other contentions raised by their petition are accepted as valid, the fact remains that this case no longer presents the "special and important reasons" necessary for granting the petition for a writ of certiorari.

II. Certiorari should Not be Granted Because the Decision of the Court of Appeals is Consistent with Other Pertinent Federal Decisions and the Legislative History of Section 232(b).

The decision of the Court of Appeals is consistent with earlier decisions of this Court. The dispositive issue in that court was whether or not Section 232(b) conferred on the President the authority to impose massive license fees on imported petroleum products. Petitioners took the position that the operative words of the section gave the executive the broadest type of power — the power to use any device to lower imports of material threatening the national security. Respondent argued that such an expansive reading of Section 232(b) raised constitutional problems and urged the lower court to adopt an interpretation of the statute which avoids serious constitutional problems. The Court of Appeals properly interpreted the section as authorizing direct methods of adjusting imports, such as quotas, but not indirect methods, such as license fees.

It is a primary maxim of statutory construction that when a statute is ambiguous, "construction should go in the direction of constitutional policy." *United States* v. *Johnson*, 323 U.S. 273, 276 (1944). This rule was recently restated in forceful terms by this Court in *Blanchette* v. *Connecticut General Insurance Corp.*, 419 U.S. 102, 134 (1974). There the Court adopted the language of the lower court and stated:

> "'[w]hen one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is favored even if language, . . . and arguably the legislative history point somewhat more strongly in another way.'" *Id.* at 134 (quoting *In Re Penn Central Transp. Co.*, 384 F. Supp. 895, 944 (Special Court 1974)).

In *National Cable Television Association* v. *United States*, 415 U.S. 336 (1974), this Court applied that rule of strict construction in a case which in many respects is analogous to the case at bar. There the Federal Communication Commission had imposed annual fees on CATV systems at a rate of $.30 per subscriber. Those fees were imposed in reliance on the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483(a), and were expected to produce $1,145,400 in annual revenues. *Id.* at 340.

This Court held that the fees were not related to the benefit conferred and that they were so excessive as to go beyond the commonly accepted meaning of a "fee." The opinion noted that the power to lay and collect taxes is a legislative function and that the fees imposed by the FCC were in the nature of a tax. The Court then suggested that a constitutionally valid delegation of the taxing power must be limited by an intelligible principle to which the body authorizing fees is directed to conform. Rather than reach the serious questions of constitutionality, the Court chose an interpretation of the statute which permitted only the imposition of fees related to the benefit conferred.

The instant case also involves the validity of fees which in reality operate as a revenue raising device. Whereas in fiscal 1974 revenues raised from *all* tariffs totalled $4.3 billion, the White House projected annual revenues from license fees on

imported oil alone at $4.8 billion. Once again, a serious question is raised concerning the constitutional validity of such a broad delegation of taxing power.

Respondents contend, in light of *National Cable Television Association*, that the Court of Appeals was compelled to interpret Section 232(b) to prohibit the imposition of such fees. See also, *Federal Power Commission* v. *New England Power Company*, 415 U.S. 345 (1974).

The opinion of the lower court is also consistent with decisions by other federal courts. *Yoshida International, Inc.* v. *United States*, 378 F. Supp. 1155 (Cust. Ct. 1974), is one example of a federal decision in conformity with that of the Court of Appeals.

In *Yoshida*, President Nixon asserted that the imposition of a 10 per cent surcharge on most imported articles was authorized by Section 5(b) of the Trading With The Enemy Act (50 U.S.C. App. § 5(b)). That act provided him with sweeping powers during any period of national emergency to issue licenses and to "regulate . . . any . . . importation . . . of . . . any property in which any foreign country or a national thereof has any interest."

The Customs Court held that this broad grant of power did not include a delegation of the taxing power.

> "It cannot be said that the investiture of a power to 'regulate' necessarily includes, *per se*, the power to levy duties." *Id.* at 1171.

We suggest, similarly, that the investiture of the power to "adjust" does not include the power to impose fees exceeding the value of the benefits provided to the importer.

Yoshida is also significant in the sense that it gave extensive consideration to the legislative history of the Trade Agreement Act of 1934 and its amendments through the Trade Expansion Act of 1962. The Customs Court, like the Court of Appeals, found the failure of Congress in 1962 to enact proposed Section 353 to be illuminating:

> "Deletion of the provision [proposed § 353] not only demonstrates that Congress was unwilling to grant such expansive discretionary power to the President, but also indicates a probable recognition by Congress that such an unrestrained grant of authority to increase existing duties and impose nonexisting duties may well have been an invalid delegation of legislative power vested solely in the Congress by the Constitution." *Id.* at 1166.

The Court of Appeals in this case drew two conclusions from the fact that Section 353 failed to be enacted. The first was that Congress believed that no other provision of the Trade Expansion Act of 1962, including Section 232(b), conferred the powers explicitly included in that section. The second was that, in enacting the Trade Expansion Act of 1962 including Section 232(b), Congress intentionally rejected the conferral of a discretionary Presidential tariff power. Respondents submit that these conclusions are logically sound and consistent with previous decisions of this Court. See *Continental Casualty Co.* v. *United States*, 314 U.S. 527 (1942); *United States* v. *Arredondo*, 31 U.S. (6 Peters) 691 (1832).

Of course the lower court's treatment of the legislative history was not limited to an analysis of the 1962 statute. To the contrary, the court had before it and properly weighed the history of trade legislation throughout the twentieth century. It concluded that when Congress desires to delegate a taxing

power it does so explicitly.[2] The court was, therefore, unwilling to find an implicit delegation of taxing power in Section 232(b). This result is required by both the legislative history and case law and is afforded exemplary treatment in the decision of the lower court.

The petition for a writ of certiorari raises for the first time a number of points dealing with the legislative history of Section 232(b). The manifest purposes of this new material is to indicate that the treatment afforded legislative history by the Court of Appeals was inadequate. Even if this material had been properly before that court, it would not have changed the result.

As part of the proposed Trade Act of 1970, the House passed an amendment of Section 232(b) designed to prohibit "any adjustment of imports . . . accomplished by the imposition or increase of duty or of any fee or charge having the effect of a duty." H.R. Rep. No. 91-1435, 91st Cong., 2d Sess. 23 (1970). Significantly, the measure was reported out of the Senate Committee on Finance not as part of a comprehensive trade act but as an amendment to the Social Security Act of 1970.

---

[2] The petitioners claim the so-called "escape clause," Section 351(a)(1) of the Trade Expansion Act, 19 U.S.C. § 1981(a)(1), confers analogous authority upon the President. The proposition is advanced to show that the broad language of Section 232(b) is not an anomalous departure from previous practice. Such an analysis cannot be sustained upon a careful examination of the statutes. The purpose of the "escape clause" is to protect an industry from detrimental foreign competition. The statute expressly gives the President the authority to impose "any duty or other import restriction" to protect a domestic industry. Section 232(b) was enacted with the stated purpose of protecting the national security and does not expressly or impliedly grant the authority to impose indirect controls on imported items. The fact remains that when Congress has delegated its control over tariffs and duties it has consistently done so in an explicit, well-defined manner, as in the case of the escape clause. Thus, the construction of Section 232(b) advanced by petitioners would, indeed, be inconsistent with the previous history of trade legislation.

It was subsequently deleted on the floor of the Senate by a vote of 49-21 and was not enacted.

The petitioners have suggested that the failure of Congress to enact this amendment in 1970 is relevant to a consideration of the meaning of Section 232(b). The respondents contend that the events of 1970 are irrelevant for three reasons. First, those events do not constitute legislative history of Section 232(b) because they occurred well after the original enactment of the section and its subsequent re-enactment. The views of the Ninety-First Congress on the meaning of Section 232(b) do not provide a solid basis from which the intention of an earlier Congress may be inferred. See, *Haynes* v. *United States*, 390 U.S. 85 (1968); *United States* v. *Price*, 361 U.S. 304 (1960).

Second, the Senate vote to delete the 232(b) amendment came on a motion by Senator Long to recommit the entire Social Security Amendment Act to the Committee on Finance. Senator Long, who was Chairman of that Committee, opened the debate on the motion to recommit with the following statement:

> "[I]f we are to pass a bill to provide for increases in social security payments even to offset the increases in the cost of living that have occurred during the past year, it cannot be accompanied by amendments relating to trade and the family assistance program." 116 Cong. Rec. 43625 (1970).

As a result, the vote to recommit was not a formal expression of support for or opposition to either the trade amendments or family assistance plan. To the contrary, that vote can only be read as an attempt to clear the way for passage of increased social security benefits by "stripping the Social Security Act of non-germane amendments." 116 Cong. Rec. 43645 (1970) (remarks of Senator Byrd).

Third, the timing of the proposed amendment undercuts the petitioner's argument. From the date of its original enactment, as a part of the Trade Agreement Extension Act of 1955, until 1973, Section 232(b) was used as authority only for imposition of a system of quotas. In 1970, the President's Cabinet Task Force on Oil Import Control suggested a radical departure from the practice and called upon the President to impose tariffs on imported oil. *The Oil Import Question* (1970). Respondents submit that the abortive Trade Act of 1970 was a reaction to the executive assertion of the existence of a tariff power. As such, it can be viewed as a reassertion of original legislative intent and a restatement of existing law, rather than an attempt to modify that law.

Similarly, petitioners' reliance on the 1958 report of the Office of Defense Mobilization as a guide to legislative intent is misplaced. First, that report was made to the Subcommittee on Foreign Trade Policy of the Committee on Ways and Means. There is no indication that the report ever came to the attention of Congress in general or even the Committee as a whole. Under these circumstances, to ascribe knowledge of the report to Congress and infer legislative intent from that knowledge would be stretching the limits of logic. Furthermore, the report does not purport to be a statement of Presidential position and is instead a "compendium" or collection of papers addressing the problem. In the absence of such a statement of position the actions of Congress in reenacting the statute obviously cannot be construed as acquiescence or ratification of a non-legislative document. *Federal Maritime Commission* v. *Seatrain Line, Inc.*, 411 U.S. 726 (1973); *Zuber* v. *Allen*, 396 U.S. 168 (1969).

It therefore appears that the treatment afforded the legislative history of Section 232(b) by the Court of Appeals was proper and that the additional material presented in the petition for a writ of certiorari would not have affected that treatment.

III. Further Consideration of Petitioners' Claim is Inappropriate Because Respondents are Entitled to Relief for Procedural Violations Not Reached by the Court of Appeals.

In the decision of the Court of Appeals, Judge Tamm wrote, "we do not reach the procedural challenges that appellants have raised to the section 1862 investigation by defendant Simon, to the imposition of the program or to the FEA regulations" (Pet. at 28a). These challenges are substantial and in themselves would have required the lower court to conclude that the procedural prerequisites to a valid exercise of the powers conferred by the Trade Expansion Act and The Federal Energy Administration Act were not met. Further review is inappropriate since the respondents would prevail if the case were heard solely on the basis of the procedural violations alleged.

A. *Respondents are Entitled to Relief Because of Procedural Violations of Section 232(b).*

Section 232(b) of the Trade Expansion Act, 19 U.S.C. § 1862(b), contemplates specific procedural steps prior to the implementation of a program to adjust imports. Under this section, the Secretary of the Treasury is to conduct an investigation requesting opinions from the Secretary of Defense and other appropriate agencies. He is to hold public hearings or otherwise afford interested parties an opportunity to present information and advice if appropriate. The Secretary is then to assimilate this information and report his findings and his recommendations to the President.

Secretary Simon determined that public hearings were inappropriate due to national security considerations. Section 232(b), however, can only be relied upon when the importation of an article is threatening the national security. The "if appropriate" language must refer to something more than just national security; to hold otherwise would be to say that hearings are never appropriate under that section.

The entire investigation conducted by the Secretary took ten calendar days, and the intervention of two weekends suggests that any real investigation took place in an even shorter period of time. Deputy Under Secretary of Labor, Joel Segall, replied to the Treasury Department that the Department of Labor could not provide the requested material within the time period allotted for investigation. (App. 78). There is language in the report of Assistant Secretary of the Treasury, David R. MacDonald, to Secretary Simon and in Secretary Simon's report to the President indicating that a Presidential Proclamation was already being drafted before receipt of the recommendations.[3] Such a superficial and hasty investigation does not satisfy the requirements of the statute and serves instead as a post hoc rationalization of a predetermined course of action.

B. *Respondents are Entitled to Relief Because of Procedural Violations of the National Environmental Policy Act.*

Procedural safeguards were further ignored by the petitioners in their attempts to comply with the dictates of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321

---

[3] The same sentence appears in both the MacDonald and Simon reports, "I understand that a Presidential Proclamation pursuant to Section 232 of the Trade Expansion Act of 1962 is being drafted by the Federal Energy Administration consistent with these recommendations." (App. 44, 63.)

et seq. NEPA was enacted to compel the thorough integration of environmental considerations into the decision-making process, in every instance in which an activity of the Federal Government would significantly affect the quality of the human environment. Council on Environmental Quality, Third Annual Report, 224-227 (1972). An after-the-fact Environmental Impact Statement (EIS), by its definition, violates the purpose of the statute because its contents could not possibly be considered in the decision-making process. Petitioners argued, however, that an after-the-fact EIS satisfies NEPA.

The requirements of NEPA must be complied with "to the fullest extent possible." Compliance is excused by that phrase only when there is a clear conflict with another statute. *Calvert Cliffs' Coordinating Committee* v. *AEC*, 449 F. 2d 1109 (D.C. Cir. 1971). Because the EIS in this case was filed after the decision to impose a license fee system and because there is no express statutory conflict, petitioners clearly did not comply with the procedural requirements of NEPA.

C. *Respondents are Entitled to Relief Because of Procedural Violations of the Federal Energy Administration Act.*

Petitioners were afforded yet another opportunity to obtain public input by the hearing and notice provisions of the Federal Energy Administration Act (FEAA), 15 U.S.C. § 761 *et seq*. Once again the procedural safeguards were set aside on the unsupported assertion that an emergency existed.[4] The

[4] Section 7(c) of the Federal Energy Administration Act makes extensive provisions for notice to be given to the Cost of Living Council and for their approval or disapproval of the proposed regulation. Provisions are also made to obtain the comments of the Administrator of the Environmental Protection Agency. These provisions may be waived by the Administrator of the FEA for a period of 14 days, if he determines that the situation requires immediate action. 15 U.S.C. § 766(c). The FEA used the 14-day waiver provision without the specific assertion of an emergency.

determination of the existence of an emergency for purposes of waiving public hearings is committed by statute to the discretion of the Administrator. The Administrator's invocation of the FEAA's emergency waiver provisions in this case was contrary to the statutory terms, since he did not independently determine that an emergency existed. Instead, the President's State of the Union Message and Secretary Simon's determination that the national security was imperiled were relied upon to conclude that an emergency existed. 40 Fed. Reg. 4771 (1975). Moreover, the public input provisions of FEAA should be waived only in a true emergency situation:

> "Restraint is required against the temptation to take action on the ground that there is an emergency, when what is more significantly operative is the conviction that the action seems reasonable on an inspection of the file." *Pennsylvania Gas and Water Company* v. *Federal Power Commission*, 427 F. 2d 568, 574 (D.C. Cir. 1971).

That no true emergency existed in the instant case is amply demonstrated by the subsequent Presidential Proclamations deferring imposition of license fees and the FEA's deferral of payment policy.[5]

In *Environmental Defense Fund* v. *Ruckelshaus*, 439 F. 2d 584 (D.C. Cir. 1971), the court stated that procedural safeguards permitting an opportunity for hearing and comment in advance of agency action should not lightly be set aside. In the case at bar, petitioners invoked "national security" and emergency situation exceptions to supersede the procedural provisions of the Trade Expansion Act of 1962, as amended, of

[5] Pres. Proc. 4355, 40 Fed. Reg. 10437; Pres. Proc. 4370, 40 Fed. Reg. 19421; 40 Fed. Reg. 36302; 40 Fed. Reg. 42578 (1975).

FEAA. The Court of Appeals did not reach the questions raised by the blanket invocation of "national security." Had these questions been reached, they would have been dispositive of this case. The respondents would, therefore, have prevailed even if that court had found that the President and petitioners had acted within the scope of their powers under Section 232(b) of the Trade Expansion Act. The existence of this independent and adequate basis for the decision of the lower court is yet another reason why this Court should not grant the petition for certiorari.

If the petition is granted, respondents ask that the questions presented be expanded to include a consideration of these procedural violations.

Conclusion.

For all these reasons, respondents submit that the petition for a writ of certiorari should not be granted.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General of Massachusetts.
THOMAS R. KILEY,
S. STEPHEN ROSENFELD,
Assistant Attorneys General.
JAMES S. HOSTETLER,
Attorney.